United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit

76-6092

To be argued by
VICTOR J. ZUPA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6092

ALFONSO F. BRUSCHI,
Plaintiff-Appellant,

—v.—

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee, Secretary of Health, Education, and Welfare.

VICTOR J. ZUPA,
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Preliminary Statement

The plaintiff-appellant, Alfonso F. Bruschi ("Bruschi") appeals *pro se* from an order of the Honorable Milton Pollack of the United States District Court for the Southern District of New York entered on April 27, 1976, granting defendant-appellee's motion for summary judgment.* The District Court held that the decision of the Appeals Council of the Social Security Administration that Bruschi was not disabled within the meaning of Section 223 of the Social Security Act, 42 U.S.C. § 423 (the "Act"), prior to March 31, 1972, the last date on which he met the special earnings requirements, was supported by substantial evidence. Judge Pollack's memorandum decision is reproduced in an "Index" filed by the appellant on this appeal.

* Defendant in fact made a motion for judgment on the pleadings which was treated by the District Court as a motion for summary judgment.

Issues Presented

1. Was the Secretary's decision that Bruschi was not disabled within the meaning of the Act supported by substantial evidence?

2. Do the medical records submitted by Bruschi to the District Court and now to this Court warrant a remand of his claim to the Secretary?

Statement of the Case

A. The Proceedings to Date

This is an action brought pursuant to section 205(g) of the Act, 42 U.S.C. § 405(g), to review a final decision of the Secretary of Health, Education, and Welfare (the "Secretary") denying appellant's application for Social Security disability benefits.

Bruschi filed an application for disability insurance benefits on September 7, 1971 alleging disability as of September 1968 due to Meniere's disease and major stomach disorders. (Tr. 111-114).* The application was denied initially (Tr. 115-116), and on reconsideration (Tr. 118-120). Thereafter, Bruschi requested an administrative hearing which was held on April 24, 1973 (Tr. 62). The Administrative Law Judge before whom Bruschi appeared considered the case *de novo*, and on August 8,

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* "Tr" refers to the transcript of the administrative record before the Social Security Administration, a certified copy of which was filed as part of the Secretary's answer to the complaint in the District Court pursuant to 42 U.S.C. § 405(g). Four copies of the transcript have been filed with this Court and designated as exhibits pursuant to Rule 30(e) of the Federal Rules of Appellate Procedure.

1973 found that Bruschi was not prevented from engaging in any substantial gainful activity for any continuous period beginning on or before March 31, 1972, the date he last met the special earnings requirements, by reason of a physical or mental impairment which has lasted or could be expected to last for at least 12 months. Thus, the Administrative Law Judge concluded, Bruschi was not disabled within the meaning of the Act (Tr. 45-54). The decision of the Administrative Law Judge became the final decision of the Secretary when it was affirmed by the Appeals Council on June 16, 1975 (Tr. 7-18).

Bruschi commenced this action on September 22, 1975 seeking a review of the Secretary's determination. On April 30, 1976, the District Court entered judgment granting the Secretary's motion for summary judgment. In an accompanying memorandum opinion the Court specifically found that the Secretary's determination was supported by substantial evidence.

On June 21, 1976, Bruschi wrote to Judge Pollack stating that he had additional evidence discovered on May 7, 1976 to support his contention, which he had made at the District Court hearing on April 21, 1976, that he had a liver condition. In his letter, Bruschi asked Judge Pollack to review this evidence. In addition, Bruschi filed, on June 14, 1976, a "Memorandum of Medical Evidence and Law in Support of Plaintiff's Motion for Judgment on the Pleadings" in which he stated he had uncovered laboratory reports going back to 1971, showing that he had a liver abnormality. Bruschi further stated in that memorandum that he was substantiating his contentions with liver biopsies taken by a Veterans' Administration hospital in 1974 and by New York Hospital on May 7, 1976. Bruschi also contended that this liver abnormality

was indicated in various medical documents in the administrative record that had been before the District Court prior to its initial decision. Judge Pollack treated Bruschi's post-decision papers as a motion for reargument and denied it on June 22, 1976.

Bruschi's motion to proceed on appeal in *forma pauperis* has been granted, and his notice of appeal was filed on June 3, 1976.

B. The Facts

1. The Medical Evidence

While the administrative record in this case is replete with evidence that Bruschi had frequent medical treatment and hospitalization, the record does not support the conclusion that, as of the date Bruschi last met the earnings requirement of the Act, he was disabled. While plaintiff has undergone surgery several times, the operations were uneventful and Bruschi recovered from them (Tr. 143-150, 203, 216-314). Plaintiff also has a hearing loss problem which can be improved by use of a hearing aid (Tr. 160-162), and he has had Meniere's disease (Tr. 87).*

The record discloses that the amount of treatment Bruschi has received greatly exaggerates the seriousness of his medical condition. He visited six different hospitals in New York City and one hospital in California a total of seventeen times in a 6-year period. He was a management problem on numerous occasions (Tr. 236-237, 279); consulted outside doctors while he was admitted to Lenox

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* A disease affecting the inner ear and causing balance problems.

Hill Hospital (Tr. 236); refused treatment (Tr. 141, 179-180, 302); and disagreed with physicians as to their diagnosis (Tr. 153). The hospital records reflect that medical tests did not support many of plaintiff's complaints, and many of his alleged ailments were unfounded (Tr. 177-178).

The issue before the Court is not whether plaintiff has certain ailments, but rather whether the record required the conclusion that they were disabling within the meaning of the Act, on or before the date Bruschi was last insured under the Act, March 31, 1972 (Tr. 8). On the specific issue of plaintiff's continuing ability to work, a vocational expert, Dr. Fishman, testified that in light of plaintiff's medical problems, employment history and education, Bruschi could perform light sedentary work, and that such work was available in the community (Tr. 97-102).

In addition, Dr. Sidney Green, an impartial medical expert whose assistance was sought by the Appeals Council, furnished a detailed written analysis of plaintiff's medical history. Dr. Green concluded that plaintiff's medical history did not show an impairment that would render plaintiff disabled within the meaning of the Act (Tr. 256-260). The District Court, in finding that there was substantial evidence to support the Secretary's finding that Bruschi was not disabled relied, in part, on Dr. Green's analysis (See memorandum at 3).

Some of Bruschi's doctors summarily concluded by letter that he was disabled (Tr. 251, 336, 337). However, these doctors did not substantiate their conclusions by detailed medical findings, and when weighed against the substantial medical tests and findings reported by the hospitals, they are entitled to little evidentiary weight.

Bruschi has asked the District Court, as he now asks this Court, to consider "new additional evidence" which he has just uncovered. (Appellant's Memo. p. 2). Plaintiff contends that these documents dating back to 1971 support his contention that in addition to all his other ailments he has a liver condition.

2. Non-Medical Evidence

Bruschi gives his date of birth as March 23, 1920 (Tr. 7). He completed eight grade school years and received vocational training in photography and in automotive electronics (Tr. 72). He has employment experience as an automobile mechanic and is proficient in the use of automotive electrical testing meters (Tr. 72-73). In addition, Bruschi has worked as a mailroom clerk, where his duties included making up packages, delivering packages to the post office and sorting mail; as a clerk for Office Temporaries, Inc. where his duties included sorting cards and general filing work; and as a shipping dispatcher (Tr. 73-75, 78). Bruschi alleged in his application for disability insurance benefits that he has been unable to work since September 1968 due to his disability (Tr. 111). His Social Security earnings record (Tr. 122), his Work Activity Reports (Tr. 134-135), and his own testimony (Tr. 78), however, indicate that he was employed for periods during 1968, 1969 and 1970. Plaintiff was also active in clubs and was the President of the New York City Hungarian Charities (Tr. 344-345). He testified that he receives $140.00 per month for a 100% non-service connected disability benefit from the Veterans' Administration (Tr. 86, 117). He spends his time reading newspapers (Tr. 85), working with a slide rule, and studying languages (Tr. 124, 344). He also told a Social Security interviewer that he studied a book on legal stenography (Tr. 124).

ARGUMENT

POINT I

The Secretary's decision that Bruschi was not disabled within the meaning of the Act is supported by substantial evidence.

The scope of review in the District Court is whether or not the Secretary's decision is supported by substantial evidence. His factual findings, if so supported, are conclusive. 42 U.S.C. § 405(g).

This Court's function in reviewing a case of this nature is the same as that of the District Court. The Court "is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g). It is not a trial *de novo* . . . The court is not at liberty to consider evidence not in the record certified by the Secretary." [citations omitted], *Atteberry* v. *Finch*, 424 F.2d 36, 39 (10th Cir. 1970); *accord, Knox* v. *Finch*, 427 F.2d 919 (5th Cir. 1970); *Walters* v. *Gardner*, 397 F.2d 89 (6th Cir. 1968); 42 U.S.C. § 405 (g). Accordingly, the Secretary's findings, if reasonable, may not be disturbed by a court on review. *Richardson* v. *Perales*, 402 U.S. 389 (1971). Moreover, the conclusive effect of the substantial evidence rule applies not only to the Secretary's findings as to basic evidentiary facts, but also to conclusions and inferences from them. *Rocker* v. *Celebrezze*, 358 F.2d 119 (2d Cir. 1966).

In order to establish entitlement to a period of disability insurance benefits under Section 223(d) of the Act, plaintiff has the burden of establishing that he was unable to engage in substantial gainful activity by reason of a physical or mental impairment, which can be ex-

pected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A). The existence of the impairment must be demonstrated by evidence supported by data obtained by medically acceptable clinical and laboratory techniques, 42 U.S.C. § 423(d)(3), and the disabling impairment must exist at a time when the claimant meets the insured status requirements of the Act. 42 U.S.C. § 423(c). *See Franklin* v. *Secretary of HEW*, 393 F.2d 640, 642 (2d Cir. 1968); *Hofacker* v. *Weinberger*, 382 F. Supp. 572 (S.D.N.Y. 1974).

For a plaintiff to be disabled within the meaning of the Social Security Act he must not only show that he has a medically determinable impairment but, in addition, he must show that such impairment deprives him of his capacity for work to the extent that he is unable to engage in any substantial gainful activity. *Fuerst* v. *Secretary of HEW*, 354 F. Supp. 185 (S.D.N.Y. 1973).

When making a finding as to plaintiff's ability or inability to engage in any substantial gainful activity, there are four elements of proof to be considered. They are: (1) medical data and findings; (2) expert medical opinion; (3) subjective complaints; and (4) plaintiff's educational background and work history. *Gold* v. *Secretary of HEW*, 463 F.2d 38 (2d Cir. 1972); *Underwood* v. *Ribicoff*, 298 F.2d 850 (4th Cir. 1962); *Toledo* v. *Secretary of HEW*, 308 F. Supp. 192 (D.P.R. 1970), *aff'd*, 435 F.2d 1297 (1st Cir. 1971).

The burden of proof rests upon the plaintiff to establish his entitlement to disability insurance benefits under the Act. *Ragan* v. *Finch*, 435 F.2d 239 (6th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *Miller* v. *Finch* 430 F.2d 321 (8th Cir. 1970).

Although Bruschi complains of a host of ailments, it is clear from the medical evidence that he has not been "disabled" under the Act for any twelve month period.

First, while he has a hearing problem it can be improved with the use of a hearing aid (Tr. 49). A moderate deafness impairment has been held not to be disabling where a hearing aid would improve the condition. *Hevener* v. *Finch*, 315 F.2d Supp. 878 (W.D. Va. 1970).

In addition, the medical evidence shows that Bruschi's Meniere's disease problems have been stabilized and that they are not disabling. While he has complained of dizziness and vertigo, the medical evidence does not support any finding other than that this condition might prevent him from performing heavy work or operating hazardous equipment (Tr. 102). This condition would not affect his employment as an office clerk in which he has had prior experience.

Despite Bruschi's claim that he is disabled because of a stomach disorder, none of the medical evidence supports any finding of permanent stomach problems. While he has had surgery related to stomach difficulties, the medical evidence shows that the surgery performed was uneventful and that plaintiff has recovered.

In addition, Bruschi has always been released in satisfactory condition from the various hospitals to which he has been admitted. On numerous occasions, his com-

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* Even disabling impairments that are remediable do not qualify a claimant for disability benefits. *Knox* v. *Finch*, 427 F.2d 919, 921 (5th Cir. 1970); *Stillwell* v. *Cohen*, 411 F.2d 574, 575-76 (5th Cir. 1969); *Henry* v. *Gardner*, 381 F.2d 191, 195 (6th Cir.), *cert. denied*, 389 U.S. 993 (1967); *Purdham* v. *Celebrezze*, 349 F.2d 828, 830 (4th Cir. 1965).

plaints were found to be too vague and generalized to justify further medical procedures. On other occasions, plaintiff's complaints were found to be merely functional, *i.e.*, the results of his personality and not of physiological causes (Tr. 258). The medical evidence also indicates that plaintiff's emotional problems do not rise to a level that would prevent substantial work activity (Tr. 258).

Dr. Fishman, a vocational expert, testified that Bruschi has the capacity to perform numerous jobs available in the economy. Specifically, he retains the ability to return to his previous clerical positions. Expert testimony such as Dr. Fishman's must be considered. *Kerner* v. *Celebrezze*, 340 F.2d 736 (2d Cir. 1965), *cert. denied*, 382 U.S. 861 (1965).

Dr. Fishman's view is supported by Dr. Green, a neurologist, who stated:

> "in my opinion, the claimant has been capable of at least light work activities on a sustained basis, with the ability to walk, manage steps, sit, stand, handle and manipulate, bend, lift and carry, provided that all such activities were not too extended without an opportunity for rest or change of position, but still within the basis of light work. There may be some reservation for working at unprotected heights or near moving machinery. Although the claimant has some hearing impairment, he has relatively good hearing in his right ear with adequate discrimination." (Tr. 258).

If an insured individual suffers from an impairment which precludes heavy work or work which requires certain kinds of physical exertion, but he can engage in other light forms of substantial activity, a "disability"

within the meaning of the Act has not been established. *Woods* v. *Finch*, 428 F.2d 469 (3d Cir. 1970); *Breaux* v. *Finch*, 421 F.2d 687 (5th Cir. 1970); *Wells* v. *Finch*, 418 F.2d 1247 (4th Cir. 1969). There are conclusory statements by some doctors that plaintiff is disabled (see p. 5 *supra*), but it is clear that such conclusory statements are not binding on the Secretary since they deal with an issue which is for the Secretary to decide. 20 CFR § 404.1526 states as follows:

> The function of deciding whether or not an individual is under a disability is the responsibility of the Secretary. A statement by a physician that an individual is, or is not, "disabled", "permanently disabled", "totally disabled", "totally and permanently disabled", "unable to work" or a statement of similar import, being a conclusion upon the ultimate issue to be decided by the Secretary, shall not be determinative of the question of whether or not an individual is under a disability. The weight to be given such physician's statement depends on the extent to which it is supported by specific and complete clinical findings and is consistent with other evidence as to the severity and probable duration of the individual's impairment or impairments.

Case law also establishes that a physician's opinion regarding disability is not determinative since it deals with the ultimate issue which is for the Secretary to decide. *See*, *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971); *Hofacker* v. *Weinberger*, 382 F. Supp. 572 (S.D.N.Y. 1974).

While plaintiff was found eligible for disability benefits by another governmental agency, the Veterans' Ad-

ministration, such a decision is not determinative of whether or not he is disabled within the meaning of the Act. 20 CFR § 404.1526. Apart from the fact that the term "disability" has a different meaning for different purposes, it is well settled that the Secretary is entitled to make his own independent findings as to whether or not an individual is "disabled" within the meaning of the Act. *Clark* v. *Weinberger*, 389 F. Supp. 1168 (D. Vt. 1974), *aff'd*, 511 F.2d 1390 (2d Cir. 1975); *Zimbalist* v. *Richardson*, 334 F. Supp. 1350 (E.D.N.Y. 1971).

In the instant case, it is clear that the Secretary's determination that the evidence did not establish that plaintiff was incapable of engaging in substantial gainful activity is supported by substantial evidence and is therefore entitled to affirmance. *Kerner* v. *Celebrezze*, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965); *Celebrezze* v. *Bolas*, 316 F.2d 498 (8th Cir. 1963).

On the basis of a thorough evaluation of the evidence of record, the Secretary determined that plaintiff failed to sustain the burden of proof that he was under a disability within the meaning of the Act.

The District Court recognized this, noting that the Appeals Council had carefully considered all Bruschi's complaints, and that a review of the entire record demonstrated that there was substantial evidence, including Dr. Green's extensive written analysis of the case, to support the conclusion that Bruschi was not disabled on or before March 31, 1972. The District Court's decision was clearly correct and should be affirmed.

POINT II

The "additional evidence" which appellant seeks to introduce does not demonstrate good cause to remand this case to the Secretary.

Plaintiff has submitted to the District Court and now to this Court "newly discovered evidence" that he had an additional ailment—a liver condition (chronic hepatitis and cirrhosis)—that dated back to 1971. Appellant's Memo p. 3. Plaintiff also states that he had no knowledge of this condition prior to May 7, 1976 when a biopsy was taken at New York Hospital by Dr. Harvey Klein. *Id.* Plaintiff's newly discovered evidence consists of a number of laboratory reports, some of which pre-date March 31, 1972, the last day plaintiff met the special earnings requirements of the Act. Plaintiff has also produced letters from a number of physicians stating that he has a liver condition. Some of the physicians state that based upon lab results (presumably the tests that plaintiff has submitted on this appeal) this condition had its origins as early as 1969 or 1971. All these letters are dated in June or July 1976, after the District Court's decision in this case.*

The Court here of course, cannot consider this evidence except to the extent that it is determinative of good cause to remand this case to the Secretary. 42 U.S.C. § 405(g); *Huckabee* v. *Richardson*, 468 F.2d 1380 (4th Cir. 1972). The plaintiff had the burden of producing to the Secretary any documents relevant to an impairment that would have rendered him disabled prior to

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* There is one letter dated December 11, 1974 which does not purport to interpret the lab results.

March 31, 1972, 42 U.S.C. § 423(d)(5); *Franklin* v. *Secretary of Health, Education and Welfare,* 393 F.2d 640 (2d Cir. 1968). Plaintiff was represented by counsel before the Secretary (Tr. 338).

The Court should not remand a case to the Secretary when the additional evidence offered is not probative of an impairment existing during the period of a claimant's insured status or is cumulative of evidence already in the administrative record, *Hess* v. *Weinberger,* 363 F. Supp. 262 (E.D. Pa. 1973); *Schal* v. *Finch,* 303 F. Supp. 595, 598-599 (W.D. Pa. 1969); *Patton* v. *Finch,* 305 F. Supp. 810, 815 (W.D. No. Ca. 1969).

The laboratory tests which plaintiff now seek to introduce as additional evidence can be described as follows: (i) laboratory tests dating back to 1969 performed while plaintiff was hospitalized in a Veteran Administration Hospital (Ex AA-AA3, A1-2),* (ii) laboratory tests performed while plaintiff was hospitalized in Flower Fifth Avenue Hospital in November of 1972 (Ex. AA4), (iii) laboratory tests dating around November 1973 performed for Dr. Atkins who was treating plaintiff at that time (Ex. A4B-A4C), (iv) laboratory tests dating around January and February 1974 performed for Dr. Dreyfus who was treating plaintiff at that time, which reports are part of the administrative record (Tr. 298) (Ex. A8), (v) a number of tests relating to the year 1974 or a period subsequent thereto including biopsy tests performed in November 1974 and in May 1976 (Ex. A12-A14B, A24), and (vi) laboratory tests unre-

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* "Ex" refers to exhibits in appellant's Index filed in this Court.

lated to a liver condition but related to plaintiff's claim of disability based upon hypoglycemia (Ex. A24, A6).

All of the additional evidence that is relevant to an impairment existing prior to March 31, 1972 is cumulative of diagnoses and medical tests already in the administrative record. Other evidence relating to a period subsequent to 1973 is not probative of an impairment that would render plaintiff disabled nor does it relate to a condition as it may have existed prior to March 31, 1972.

The records relating to plaintiff's hospitalization at the VA hospital for the period December 1968 to June 1973 are part of the administrative record (Tr. 183-224) and were considered by the Appeals Council (Tr. 8). The lab reports that plaintiff claims relate to that hospitalization are subsumed in the extensive diagnoses and summaries of lab results that appear in the VA records. These records are in the administrative record.

Also, the records relating to plaintiff's hospitalization at Mt. Sinai Hospital in May 1972, which are in the administrative record that was considered by the Appeals Council, show that plaintiff was diagnosed as having a liver condition (Tr. 316, 318), and show lab tests similar to those plaintiff now seeks to introduce as new additional evidence (Tr. 333).

In November 1972, Flower Fifth Avenue Hospital reported normal blood chemistries for plaintiff (Tr. 177). Plaintiff now seeks to introduce the actual lab reports (Ex. A4), to refute that hospital's summary and diagnosis.

In August 1972, Serra Memorial Hospital specifically found that plaintiff's liver was normal and that laboratory results were within normal limits (Tr. 244-245).

In January 1974, Dr. Atkins, who had been treating plaintiff since November 1973, referred plaintiff to Dr. Dreyfus at New York Hospital (Tr. 315). Plaintiff told Dr. Dreyfus he had had "liver trouble" at Mount Sinai Hospital, referring to his hospitalization at that hospital in May 1972 (Tr. 262-263). In January 1974, Dr. Dreyfus noted possible "liver trouble" and hepatitis, noted elevated alkaline phosphatase and SGOT levels in laboratory tests, and planned a liver scan and a biopsy (Tr. 272, 277-278). The scan showed the liver to be normal (Tr. 282-283). The plaintiff, however, refused the liver biopsy (Tr. 286-287). Other reports in the administrative record show that Dr. Dreyfus noted elevated alkaline phosphatase and SGOT levels and that Dr. Dreyfus was aware that an abnormal liver condition existed (Tr. 298). Plaintiff was discharged from New York Hospital on February 8, 1974 with the notation that he had refused the liver biopsy (Tr. 302).

In July 1974, plaintiff was re-admitted to New York Hospital where the records reveal that he had a liver condition but that this condition was not chronic (Tr. 313-315).

Plaintiff now seeks to introduce the opinions of Dr. Dreyfus and Dr. Atkins, the physicians whose care plaintiff was under during his hospitalization at New York Hospital, to show that the liver condition, which they were aware of, was chronic. The tests and opinions of the treating physicians are, however, already in the administrative record and were considered by the Appeals Council.

The tests relating to periods subsequent to July 1974 and the doctors' letters which plaintiff now seeks to introduce as new additional evidence are not probative of

a condition existing prior to March 31, 1972, the last date plaintiff has met the special earnings requirement. While plaintiff's liver condition may have worsened in 1976, this is no evidence that there was a disabling condition prior to March 31, 1972. The Appeals Council considered plaintiff's liver condition together with his other ailments (Tr. 14), in concluding that he was not disabled. All relevant evidence relating to that condition was in the administrative record.

It is also apparent that plaintiff knew throughout his periods of hospitalization that there were abnormalities in his liver functions. In addition to the various references throughout the administrative record to his liver condition, plaintiff told Dr. Dreyfus in January 1974 that he had liver trouble and plaintiff mentioned his liver ailment at the District Court hearing.* Furthermore, plaintiff was represented by counsel throughout the administrative process. In fact, the Appeals Council specifically requested plaintiff's attorney to comment on the evidence to be considered. Not only did plaintiff's counsel comment (Tr. 359-360), but plaintiff himself summarized his case (Tr. 247-250). In addition, Dr. Dreyfus by letter dated May 31, 1974, three months after he had seen plaintiff at New York Hospital, wrote to plaintiff's attorney summarizing plaintiff's ailments and enclosing laboratory results done by him (Tr. 335-336, 298). As to the liver problem Dr. Dreyfus notes "He had intermittent liver function abnormalities of a mild degree". (Tr. 335). From the foregoing discussion, it is evident that Bruschi's so-called new evidence is not really new, and is not probative of the possible existence of a dis-

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* Plaintiff acknowledges this in his letter to Judge Pollack, dated June 21, 1976. Ex. 15B.

ability on March 31, 1972. Furthermore, none of this evidence refutes the basic fact that there is a mass of evidence already in the record, and this evidence was properly evaluated by the Secretary. The new evidence would not cause a change in the Secretary's decision, and therefore this Court should not remand this case to the Secretary.

CONCLUSION

The Secretary's determination that Bruschi was not disabled is supported by substantial evidence and no good cause has been shown to remand the case to the agency. The decision of the District Court should therefore be affirmed.

Dated: New York, New York
September 23, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee, Secretary of Health, Education, and Welfare.

VICTOR J. ZUPA,
PETER C. SALERNO,
Assistant United States Attorneys, Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-6092

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

23rd day of **September**, 19 **76** she served ~~a~~ copies of the within **printed copies of govt's brief**

by placing the same in a properly postpaid franked envelope addressed:

Alfonso F. Bruschi,
400 East 85th St. Apt 2C
NewYork, N.Y. 10028

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

23rd day of **September**, 19 **76**

Ralph Y. Lee

RALPH Y. LEE
Notary Public, State of New York
No. 41-2292836 Queens County
Term Expires March 30, 1977